Lectromelt Casting and Machinery Company, a Division of Akron Standard Division, Eagle Picher Industries, Inc.; and Lectromelt Casting Division, Ravenna Industries, Inc., a wholly-owned subsidiary of the A. C. Williams Company *and* Helis Palmer

Lectromelt Casting Division, Ravenna Industries, Inc., a wholly-owned subsidiary of the A. C. Williams Company *and* Donnal May. Cases 8–CA–13000 and 8–CA–13431

11 April 1984

DECISION AND ORDER REMANDING

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 1 December 1982 Administrative Law Judge Lowell Goerlich issued the attached decision. The General Counsel filed exceptions and a supporting brief, Respondents Akron and Ravenna filed cross-exceptions and supporting briefs, and Respondent Akron filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order only to the extent consistent with this Decision and Order.

Based on his assessment of the credited testimony, the judge found that Helis Palmer was suspended for cause and not because of his union or other protected activities. Accordingly, he recommended that the consolidated complaint, as amended, be dismissed insofar as it alleges that Palmer was unlawfully suspended. We agree.

Without reaching the merits, the judge recommended further that the complaint be dismissed in its entirety. In this respect, he found that a private settlement agreement between the Union and Respondent Ravenna bars prosecution of a claim that employees were unlawfully discharged following an unauthorized work stoppage precipitated by Palmer's suspension.

Contrary to the judge, we find, on the facts and for the reasons set forth below, that the private settlement agreement here in question is not a bar to this aspect of the proceeding, which we shall remand to the judge for disposition on the merits.

The record establishes that Palmer was given a 5-day disciplinary suspension commencing Monday, 11 June 1979. On that date, Respondent Akron met with a union committee which sought revocation of the suspension. This grievance was not resolved. On the following day employees went out on a wildcat strike to protest the suspension. In the course of the strike, which the General Counsel concedes was unprotected, Akron obtained a temporary restraining order against employee misconduct, citing mass picketing and blocking of its facility by strikers.[3]

Contemporaneously, Akron filed a Section 301 suit against the Union for breach of contract, seeking compensatory and punitive damages, and on 20 June, the day after the strike ended, filed charges with the Board. A complaint subsequently issued alleging that the Union, through its officers, agents, and representatives, including the three alleged discriminatees herein: Palmer, Donnal May, and Eddie May, violated Section 8(b) of the Act by engaging in the picket line misconduct, mentioned above.

Meanwhile, on 18 June, Akron discharged 10 employees, including Palmer and the two Mays, for having "instigated, supported and/or participated in the illegal wildcat strike. . . ." Grievances lodged on their behalf were rejected by Akron 25 June. On 16 July counter charges were filed against Akron by Palmer and, subsequently, by another former striker, Probst, on behalf of himself and others, alleging that they were unlawfully discharged.

This is how matters stood when Respondent Ravenna, cognizant of the foregoing, purchased Akron's assets and took over the latter's operations as a successor on 20 August 1979. On the same date, Ravenna entered into an agreement with the incumbent Union recognizing it as the employees' bargaining representative and adopting the labor agreement of its predecessor, subject to certain modifications, terms, and conditions, of which the following are here relevant:

> 6. All lawsuits and NLRB charges filed by Lectromelt Division will be dropped.
>
> 7. The ten (10) employees terminated by Lectromelt Division will be reinstated Wednesday,

[1] Respondent Akron has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and positions of the parties.

[2] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] Subsequently, Respondent Akron obtained a preliminary injunction against the Union for the conduct here cited.

> August 22, 1979, provided that they drop all charges and claims against Lectromelt Division.

Thereafter, the parties signed a document memorializing certain action taken pursuant to the above accord. It states:

> Of the ten (10) employees terminated four (4) did notify the Company by August 22, 1979 of their intention to drop their charges. . . .
>
> These four employees submitted to the Company a copy of a letter they gave the NLRB indicating their desire to drop charges.
>
> They are therefore reinstated.
>
> The remaining six (6) employees who were terminated will not be reinstated.

Consistent with the agreement, the Respondent also ended all litigation and abandoned all claims arising out of the wildcat strike.

As previously mentioned, the judge held that this agreement and the action taken with respect to it extinguished the right of employees to seek adjudication of their claim that they were unlawfully discharged. We disagree.

The Board's authority to adjudicate an unfair labor practice charge under Section 10(a) of the Act is not affected by any private agreement among parties to a dispute which is the subject of that charge.[4] To be sure, the Board has deferred to private settlement agreements under certain circumstances where the Board is persuaded that it would effectuate the purposes of the Act to do so.[5] However, in the case before us, yielding to the agreement in no manner resolves the issues raised. For, on its face, the agreement does no more than offer each discharged striker immediate reinstatement as a quid pro quo for abandoning his claim that he was unlawfully discharged. With respect to those who failed or refused to accept this offer within the time allowed, the offer was withdrawn and the discharged employees were left in the same position as before—free to exercise whatever right of access to the Board's processes the Act allows.

In these circumstances, we find that the settlement agreement between Respondent Ravenna and the Union does not bar prosecution of complaint allegations that Palmer and the two Mays, who with three others did not accept the offer of reinstatement,[6] were discharged in violation of Section 8(a)(3) and (1) of the Act.

Accordingly, we will remand this proceeding to the judge for a decision on the merits.[7]

ORDER

Pursuant to Section 102.48 of the Board's Rules and Regulations, it is ordered that Cases 8-CA-13000 and 8-CA-13431 be remanded to Administrative Law Judge Lowell Goerlich for disposition on their merits.

IT IS FURTHER ORDERED that the judge shall prepare and serve on the parties a Supplemental Decision in said cases containing his resolutions with respect to the credibility of witnesses, findings of fact, conclusions of law, and recommendations; and that, following the service of such Supplemental Decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations, Series 8, as amended, shall be applicable.

CHAIRMAN DOTSON, dissenting in part.

Like the judge I would defer to the August 1979 settlement between the Respondent and the Union and dismiss the allegations that the Respondent discriminatorily discharged Palmer and Donnal and Eddie May. By the settlement the parties reasonably resolved multiple disputes resulting from a wildcat strike and gave the 10 discharged strikers an opportunity for reinstatement. The agreement represents the fruits of voluntary bargaining and is consistent with the policies of the Act. Deferral is appropriate.

[4] *Machinists Lodge 743 v. United Aircraft Corp.*, 337 F.2d 5 (2d Cir. 1964).

[5] See, e.g., *Central Cartage Co.*, 206 NLRB 337 (1973).

[6] The complaint in this proceeding does not allege violations with respect to the other employees who failed to accept the offer of reinstatement.

[7] Having decided to remand the instant proceeding, we shall deny the Respondent's motion to introduce newly discovered evidence, without prejudice to the Respondent's right to renew its motion before the judge.

DECISION

STATEMENT OF THE CASE

LOWELL GOERLICH, Administrative Law Judge. Helis Palmer, an individual, filed the original charge in Case 8-CA-13000 on July 16, 1979, alleging that Lectromelt Casting Co. had discharged him on June 18, 1979, in violation of Section 8(a)(3) of the National Labor Relations Act herein referred to as the Act.

On August 13, 1979, Palmer filed an amended charge of the same import in Case 8-CA-13000 except that it named the Employer as Lectromelt Casting and Machinery Co.

On or about August 20, 1979, Lectromelt Casting Division, Ravenna Industries, Inc., a wholly-owned subsidiary of The A. C. Williams Company, hereinafter referred to as Ravenna, acquired the assets of Lectromelt Casting

and Machinery Company, a Division of Akron Standard Division, Eagle Picher Industries, Inc., hereinafter referred to as Akron, and continued Akron's operations.

On December 12, 1979, Donnal May, an individual, filed a charge in Case 8-CA-13431 naming Lectromelt Casting and Machinery Company as the Employer. In the charge it was alleged that the Employer had discharged Eddie Lee May, Odell May, Donnal May, Paul Armbruster, and Larry Westfall in violation of Section 8(a)(3) of the Act. The charge was served on Ravenna on December 19, 1979. On August 21, 1980, a complaint and notice of hearing was issued on Donnal May's charge in Case 8-CA-13431 naming Ravenna as Respondent. Among other things, it was alleged in the complaint that Ravenna had purchased the assets of Akron on August 20, 1979, and since such date has been engaged in the same business operations, and that at the time of purchase Ravenna had knowledge of a charge filed by Forrest Probst in Case 8-CA-13053 against Akron. It was also alleged that Akron discharged Donnal May and Eddie Lee May on June 18, 1979, in violation of Section 8(a)(3) of the Act, and that since August 20, 1979, Ravenna had refused to employ these employees.

On September 22, 1980, Ravenna filed its answer denying that it had engaged in the unfair labor practices alleged but admitting that:

> On or about August 20, 1979, The A. C. Williams Company purchased the assets of the Lectromelt Casting and Machinery Company, a division of Akron Standard Division, Eagle Picher Industries, Inc., including the facilities and equipment. The assets were transferred to the Lectromelt Casting Corp., an Ohio corporation which was a wholly-owned subsidiary of Ravenna Industries, Inc. Lectromelt Casting Corp. was merged into Ravenna Industries, Inc. on December 17, 1979. Since August 20, 1979, Respondent has been engaged in the same business operations, at the same location, selling the same products to substantially the same customers, and has a majority of its employees individuals who were previously employees of the Lectromelt Casting and Machinery Company, a division of Akron Standard Division, Eagle Picher Industries, Inc.
>
> . . . .
>
> At the time of purchase of the assets of Lectromelt Casting and Machinery Company, on or about August 20, 1979, Respondent had knowledge of a charge filed by Forrest Probst in Case No. 8-CA-13053 against Lectromelt Casting and Machinery Company, a division of Akron Standard Division, Eagle Picher Industries, Inc.

On March 10, 1981, Ravenna Industries, Inc., filed for reorganization under chapter 11 of The Bankruptcy Act.

On March 26, 1981, an order consolidating cases, amended consolidated complaint, and notice of consolidated hearing in Cases 8-CA-13000 and 8-CA-13431 was issued naming Ravenna as Respondent in both cases. The allegations of the consolidated complaint were essentially the same as those of the previous complaint except that Helis Palmer was named as an additional discriminatee.

On April 16, 1981, Ravenna answered the amended consolidated complaint. Its answer to the amended consolidated complaint was essentially the same as its answer to the previous complaint; however, the admission was added:

> At the time of purchase of the assets of Lectromelt Casting and Machinery Company, on or about August 20, 1979, Respondent had knowledge of the charge filed by Helis Palmer in Case No. 8-CA-13000 against Lectromelt Casting and Machinery Company, a division of Akron Standard Division, Eagle Picher Industries, Inc.

On October 22, 1981, Helis Palmer filed a second amended charge in Case 8-CA-13000 naming Lectromelt Casting and Machinery Company, a Division of Akron Standard Division, Eagle Picher Industries, Inc., and Lectromelt Casting Division, Ravenna Industries, Inc., a wholly-owned subsidiary of The A. C. Williams Company, as the Employers, and charging that these Employers discharged Palmer, Donnal May, and Eddie Lee May in violation of Section 8(a)(3) of the Act. The second amended charge was served on Akron and Ravenna on October 22, 1981.

On November 4, 1981, an order consolidating cases, second amended consolidated complaint, and notice of consolidated hearing was issued naming Akron and Ravenna as Respondents in Case 8-CA-13000 and Ravenna as Respondent in Case 8-CA-13431. The second amended consolidated complaint was essentially the same as the prior amended consolidated complaint. Added was an allegation that:

> A charge in Case No. 8-CA-13053 was filed by Forrest Probst against Respondent Akron on August 1, 1979, service by registered mail being made upon Respondent Akron on or about August 7, 1979, which named, among others, Donnal May and Eddie Lee May as discriminatees because of their discharges on June 18, 1979.

On or about January 6, 1982, Respondents Ravenna and Akron filed separate answers denying that they had engaged in the unfair labor practices alleged. They also pled a number of affirmative defenses, one of which was:

> The unfair labor practice charges filed against Respondent Akron were part of a grievance settlement negotiated by Respondents with the incumbent union, Local 45, International Molders & Allied Workers Union, which was the exclusive bargaining agent for the discriminatees and other bargaining unit employees. As part of said grievance settlement, the charges were to be withdrawn and, in exchange therefor, Respondent Akron caused a Section 301 damage suit against the Union to be dismissed and Respondent Akron withdrew certain unfair labor practice charges which were pending against the Union and upon which Region 8 of the

N.L.R.B. had issued complaint. In further consideration thereof, Respondent Ravenna offered reinstatement to the 3 above referred discriminatees. Accordingly, there was a full settlement reached and Respondent Akron fully complied with the terms of said settlement and should not now be put to a defense of said unfair labor practice charges.

The matter came on for hearing on January 21 and 22, March 10, 11, and 12, and July 14 and 15, 1982, in Akron, Ohio. Each party was afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, to argue orally on the record, to submit proposed findings of fact and conclusions of law, and to file briefs. All briefs have been carefully considered.

On the entire record[1] in this case, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT, CONCLUSIONS, AND REASONS THEREFOR

I. THE BUSINESS OF RESPONDENTS

Ravenna Industries, Inc., is now, and has been at all times material herein, an Ohio corporation which is a wholly owned subsidiary of The A. C. Williams Company, which is now, and has been at all times material herein, an Ohio corporation.

On or about August 20, 1979, The A. C. Williams Company purchased the assets of Respondent Akron, including the facilities and equipment. The assets were transferred to Lectromelt Casting Corp., an Ohio corporation which was a wholly owned subsidiary of Ravenna Industries, Inc. Lectromelt Casting Corp. was merged into Ravenna Industries, Inc., on December 17, 1979.

Since August 20, 1979, and at all times material herein, Respondent Ravenna has been engaged in the same business operations, at the same location, selling the same products to substantially the same customers, and has had as a majority of its employees individuals who were previously employees of Respondent Akron.

By virtue of the operations described above Respondent Ravenna has continued the employing entity and is a successor to Respondent Akron.

At all times material herein Respondent Ravenna has been engaged in the manufacture and sale of foundry castings at its facility located in Barberton, Ohio, the only facility involved herein.

Respondent Akron was engaged in the manufacture and sale of foundry castings at its facility located in Barberton, Ohio, until on or about August 20, 1979.

Annually, in the course and conduct of its business operations, Respondent Akron, prior to its sale referred to above, shipped goods valued in excess of $50,000 from its Barberton, Ohio facility to points located outside the State of Ohio.

Respondent Ravenna is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

Respondent Akron is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

International Molders and Allied Workers Union, Local Union No. 154, herein called the Union, is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Suspension of Helis Palmer*

Helis Palmer was the chairman of the safety committee at Respondent Akron. In February 1979 he had filed a charge with OSHA against Respondent Akron. OSHA conducted an inspection in May 1979 which resulted in Respondent Akron's being cited for some violations.

Palmer's job was that of clamp and rollover man. His performance was essential to uninterrupted production for, unless Palmer completed his tasks, other employees who worked with him were unable to commence their tasks. Thus, when Palmer's assignments were not completed, other employees were generally idle and production was held up. This, according to L. J. Walker, Palmer's foreman, occurred on June 7, 1979. As a result, on June 8, 1979, Walker gave Palmer a letter of suspension for violation of "Plant Rules Group C-5, refusal or failure to follow instructions of Supervision." The letter further revealed:

> Although I told you to stay on your job and work and not wander around the plant, on Thursday, June 7, 1979 you disobeyed my order to stay on the job and you were wandering along the canal and out in back of the buildings.

Palmer was suspended from work commencing on June 11, 1979, and continuing through June 15, 1979.

Walker's testimony confirmed his charges against Palmer. Palmer denied that he had "wandered" as asserted by Walker and claimed that he was on safety committee business with Walker's permission.

In respect to the incidents involving Palmer's alleged misconduct I do not consider either Palmer or Walker to be a wholly reliable witness. Nevertheless, a resolution may be made since George Stasko, an Akron employee who had no interest in the outcome of this proceeding, testified credibly. Stasko figured in a truck incident which Palmer claimed he was investigating as a safety committeeman and which was cited, among other things, as a basis for Palmer's suspension. On June 7, 1979, Stasko was driving a dump truck. According to Palmer, he conferred with Stasko and inspected the dump truck, which Stasko had told him "didn't have good brakes, and that the dumping part was not working right."

[1] There being no opposition thereto, Respondent Akron's motion to correct the transcript is granted and the transcript is corrected accordingly.

There being no opposition thereto, Respondent Akron's and Respondent Ravenna's separate requests that the General Counsel's petition to revoke subpena, the answer thereto, and the ruling thereon be made a part of the official record are hereby granted and the same are hereby included in the record.

Palmer testified further that he rode in the truck and when he alighted from the truck Foreman Walker advised him that Michael Klimko, manager of industrial relations, wanted to see him. Walker testified that he saw Palmer alight from the truck and asked him what he was doing in the truck. Palmer replied that Stasko had "asked him to check the truck, that something was wrong with the truck." Walker directed Palmer to return to his job. Upon inquiry by Walker, Stasko said that nothing was wrong with the truck and that he had not asked Palmer to "go out there."

Stasko contradicted the testimony of Palmer. Stasko testified that he recalled the dump truck incident, but that he had made no safety complaints to Palmer about the truck. Palmer had "waved" him down. Palmer entered the truck and asked "how everything was going." Palmer then rode to the dump and back in the truck with Stasko. Walker was there when "[Stasko] let Palmer out of the truck." Either that day or the next day Walker "asked [Stasko] what Mr. Palmer was doing in the truck and [he] said [Palmer] got in and asked [him] how everything was going and rode back with [him]." Stasko did not usually drive this particular truck.

Palmer having been discredited in respect to the truck incident, and in light of the record as a whole, I do not believe the denials that he was otherwise wandering from his job on June 7, 1979. Thus, in the light of the credible testimony of Stasko, I find that Palmer was suspended for a cause unrelated to his union activities. Accordingly, the General Counsel has not proved by a preponderance of the evidence, as claimed, that Palmer was suspended because he filed charges with OSHA or was an aggressive union safety partisan. Allegations in the second amended consolidated complaint going to these alleged violations of the Act are dismissed.

B. *Respondents' Claim That Compliance With a Settlement Agreement With the Union Is Grounds for Dismissal of the Second Amended Consolidated Complaint*

Around the middle of 1978, within 2 weeks after Michael Klimko, manager of industrial relations, commenced employment with Respondent Akron (Klimko's employment commenced in May 1978), Donnal May came into Klimko's office with two committeemen and demanded that May be assigned to a certain crane job. Klimko declined. Shortly thereafter, Klimko looked out the window and "everybody was going out the gate." After a short meeting with the manager of industrial relations at Akron Standard, the strikers came down from the "hill"[2] and returned to work.

On February 9, 1979, while Joseph Segatta, vice president of industrial relations, was in the plant, Donnal May asked him for a meeting. Segatta declined stating that he was busy and that the meeting should be scheduled later. According to Segatta, "One thing lead to another," there was a "little shouting," and Segatta was "shaking [his] finger in [May's] face to try to make a point." May "brush[ed]" Segatta's hand away with his hand. Segatta gave May a 3-day suspension. Immediately, a wildcat strike occurred.

After 1 day Respondent Akron gave in and revoked May's suspension. Segatta described the resolution, "We buried the axe and started anew, made a new beginning."

On February 16, 1979, Segatta directed a letter to the Union as follows:

> On Monday, February 12, 1979 the plant returned to normal operation after a one day wildcat strike on Friday, February 9, 1979. The company and the union were scheduled to meet at 1:00 p.m. on February 12, 1979, and the company had at that time definitely planned to:
>
> 1. Bring a law suit for full and complete damages against the:
>
> A. International Union
> B. Local Union 154
> C. Local Union Committee Members and Officials
>
> 2. File an 8 B-3, unfair labor [practice] charge, against the union with the National Labor Relations Board for the union's causing of a strike without due recourse to the labor contract and a refusal to bargain about the issues.
> 3. Seriously discipline the union committee members and officials. When a walk out occurs the union representatives have a greater responsibility than the rank and file employees to be on the job and to set the example as union leaders. Their absence from their jobs during a walk out indicates complete support for an illegal act.
>
> After our meeting began, on Monday, the company noted the conciliatory and cooperative attitude of the union committee who indicated that they wanted to work with management in making the plant productive. With this type of reception all three items listed above were dropped from the agenda when the company met in caucus. We will work with you and we want you to work with us.
>
> However, if this type of illegal action occurs in the future, the company will not hesitate to take the action mentioned above as well as any other action deemed necessary to the fullest extent.

As noted above, Helis Palmer was suspended on June 8, 1979, for 5 days, June 11 through 15. On June 11, 1979, a meeting was held between Respondent Akron and the union committee during which the Palmer suspension was considered. The committee included Donnal May as its chairman. The grievance was not settled. On June 12, 1979, a wildcat strike was commenced. Respondent Akron refused to meet with the Union until the employees returned to the plant. Respondent Akron stood pat. The strike continued until June 19 when the employees returned to work. Around 15 employees worked during the strike. None of the alleged discriminatees worked.

[2] The "hill" was the place where the picket line was established during strikes. Going up on the "hill" meant going on strike.

On June 13, 1979, Respondent Akron filed an action in the Court of Common Pleas for Summit County against the Union and others seeking, among other things, a temporary injunction against the employees' misconduct, citing mass picketing and the blocking of access to and egress from Respondent Akron's premises. On June 13 a temporary restraining order was granted; on June 26, 1979, a preliminary injunction was entered.

On June 15, 1979, Respondent Akron filed a complaint against the Union for breach of contract pursuant to Section 301 of the Labor Management Relations Act, as amended, 29 U.S.C. §175. Among other things, Respondent asked for $250,000 as compensatory damages and $10,000 for each day the Union engaged in the strike as punitive damages.

On June 20, 1979, a charge was filed with the National Labor Relations Board by Respondent Akron charging the Union with unfair labor practices. On July 26, 1979, a complaint and notice of hearing was issued in Case 8–CB–3926 in which, among other things, it was alleged:

> On or about June 13, 1979, and continuing until June 20, 1979, Respondent, through its officers, agents, representatives, *Donnal May, Eddie May*, Forest [sic] Probst, *Helis Palmer* and/or other duly authorized pickets, whose identities are unknown, in the presence and sight of employees, physically blocked the driveways to the Employer's premises which had the effect of barring, delaying, hindering, obstructing and preventing ingress and egress to and from the Employer's plant by employees. [Emphasis supplied.]

On June 18, 1979, Paul Armbruster, Odell May, Harold Ireton, James Ritter,[3] Larry Westfall, Bobby Ward, Forrest Probst, Eddie Lee May, Donnal May, and Helis Palmer were discharged for cause in that each "instigated, supported and/or participated in the illegal wildcat strike,[4] commencing June 12, 1979 at Lectromelt Casting & Machinery Company." (G.C. Exh. 4.)

Grievances for these employees were denied by Respondent Akron on June 25, 1979.

As noted above, Respondent Ravenna purchased the assets of Respondent Akron on August 20, 1979, "except its agreement with the International Molders and Allied Workers Union, AFL–CIO (molders), which union represented the employees of Lectromelt Casting Division." On the same day Respondent Ravenna entered into a labor agreement with the Union in which it recognized the Union as the exclusive bargaining agent for its employees at Ravenna. Among other things, Respondent adopted the contract between the Union and Respondent Akron with certain conditions. Among these conditions were:

> 5. The language of the contract as herein revised and restated shall control the relations between the parties without reference to any grievance decision, Arbitration decision or written or unwritten past practice which may have been in effect prior to August 20, 1979 or which either party may claim to have been in effect prior thereto.
>
> 6. All lawsuits and NLRB charges filed by Lectromelt Division will be dropped.
>
> 7. The ten (10) employees terminated by Lectromelt Division will be reinstated Wednesday, August 22, 1979, provided that they drop all charges and claims against Lectromelt Division.[5]

Thereafter Respondent Ravenna and the Union[6] jointly signed the following memorandum:

> The agreement between the Company and the Union signed 8-16-79 [sic] stipulates:
>
> 6. All lawsuits and NLRB charges filed by Lectromelt Division will be dropped.
>
> 7. The ten (10) employees terminated by Lectromelt Division will be reinstated Wednesday, August 22, 1979, provided that they drop all charges and claims against Lectromelt Division.
>
> Of the ten (10) employees terminated four (4) did notify the Company by August 22, 1979 of their intention to drop their charges. They are James Ritter, Harold Ireton, Bobby Ward, and Forrest Probst.
>
> These four employees submitted to the Company a copy of a letter they gave the NLRB indicating their desire to drop charges.
>
> They are therefore reinstated.
>
> The remaining six (6) employees who were terminated will not be reinstated.

On August 20, 1979, the original charge of Helis Palmer dated July 16, 1979, and the amended charge dated August 13, 1979, were pending and Forrest Probst's charge filed August 1, 1979, was pending. The first complaint was not issued until a year later on August 21, 1980. The last amended complaint was filed on November 4, 1981. Answers were finally filed on January 6, 1982, and the second amended consolidated complaint came on for hearing on January 21, 1982. Briefs were filed on November 2 and 3, 1982. Thus, when the hearing was commenced on January 21, 1982, the discriminatees had been without jobs with Respondents for 2-1/2 years.

The settlement negotiated with Respondent Ravenna provides for full reinstatement of the three alleged discriminatees, as well as the remainder of the alleged wildcat strikers, with the loss of accrued backpay for about 8 weeks. Had Palmer not been lawfully suspended his loss would have been an additional 5 days' backpay. If it is considered that wildcat strikers are not favorites of the law and that the burden was on the General Counsel to prove that the alleged discriminatees did not instigate or participate in the wildcat strike (see *K & K Transportation Corp.*, 262 NLRB 1481 (1982)), had the General

[3] Ritter was also cited for throwing rocks at nonstriking employees.

[4] The General Counsel concedes that the strike was an illegal wildcat strike.

[5] Among others, Kim A. Bond, who had been president of the Union during the June strike, signed the agreement.

[6] The Union included the International and Local No. 154.

Counsel joined[7] in the settlement agreement it surely would have withstood any claim that the settlement did not effectuate the policies of the Act.[8] For Helis Palmer, Donnal May, and Eddie Lee May the setttlement agreement meant immediate reinstatement which would have probably continued them in gainful employment in their exact jobs until Respondent Ravenna entered bankruptcy. Additionally, as reinstated employees, their discharges would not have banned them from exercising their duties as shop committeemen. Such a settlement closely approximating the status quo ante surely is not at odds with a national labor policy which envisions a restoration of the status quo ante and an expeditious return to work of discriminatees discharged in violation of Section 8(a)(3) of the Act. In the case of *Ford Motor Co. v. EEOC*, 29 FEP Cases 121 (1982), Justice O'Connor, speaking for the Supreme Court, said (at 122):

> But for the victim of job discrimination, delay is especially unfortunate. The claimant cannot afford to stand aside while the wheels of justice grind slowly toward the ultimate resolution of the lawsuit. The claimant needs work that will feed a family and restore self-respect. A job is needed—now. . . .

A "now job" was in the offing for each alleged discriminatee on August 20, 1979; nevertheless, the wheels of justice have continued to grind during a long period in which the alleged discriminatees could have been gainfully employed. In terms of accomplishment the wheels of justice spin to small end.

In the same case Justice O'Connor points out that the preferred means for bringing discrimination to an end is "through '[c]ooperation and voluntary compliance'" whereas "[d]elays in litigation unfortunately are now commonplace, forcing the victims of discrimination to suffer years of underemployment or unemployment before they can obtain a court order awarding them the jobs unlawfully denied them." Id. at 125–126.

The instant case is a puissant example of what the Supreme Court was concerned about in *Ford Motor Co.*, supra. Thus, a sound labor policy would seem to contemplate and encourage the fashioning and acceptance of means by which good-faith voluntary settlement of discrimination cases may be expeditiously achieved. However, to obtain this goal, authority must be lodged in the bargaining agent to bind the alleged discriminatee it represents to the voluntary settlement it negotiates even though a charge of unfair labor practices has been filed with the Government and the Government has thus become a party to the labor dispute. Otherwise, the inducement to voluntarily settle a labor dispute is lacking.

In the case of *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967), the Supreme Court said:

> National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. *The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees.* "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents . . . ." *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 202. Thus only the union may contract the employee's terms and conditions of employment, and provisions for processing his grievances; the union may even bargain away his right to strike during the contract term, and his right to refuse to cross a lawful picket line. The employee may disagree with many of the union decisions but is bound by them. "The majority-rule concept is today unquestionably at the center of our federal labor policy." "The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338. [Emphasis supplied.]

It is further stated in *Ford Motor Co. v. Huffman*, 345 U.S. 330, 339 (1953), "The National Labor Relations Act, as amended, gives a bargaining agent not only wide responsibility but authority to meet that responsibility." In *Hines v. Anchor Motor Freight*, 424 U.S. 554, 563–564 (1976), the Supreme Court opined: "Wages, hours, working conditions, seniority, and job security therefore became the business of certified or recognized bargaining agents, as did the contractual procedures for the processing and settling of grievances, including those with respect to discharge. . . . The union's broad authority in negotiating and administrating effective agreements is 'undoubted,' *Humphrey* v. *Moore*, 375 U.S. 335, 342 (1964) . . . ."

In the recent case of *Clayton v. Automobile Workers (ITT Gilfillan)*, 451 U.S. 679 (1981), the Supreme Court observed, in referring to the rule in *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965), that it was "intended to protect the integrity of the collective-bargaining process and to further that aspect of national labor policy that encourages *private* rather than judicial resolution of disputes arising over interpretation and application of collective-bargaining agreements." (Emphasis supplied.) In the light of these Supreme Court decisions, it is clear that, had no unfair labor practice charges been pending before the Board, the Union's August 20, 1979, agreement with Respondent Ravenna would have bound the employees the Union represented.

As noted above, at the time the Union negotiated the settlement, the discharge grievances of the alleged discri-

[7] In this regard the Regional Director's approval of the withdrawal of Probst's unfair labor practice charge was tantamount to an approval of the settlement agreement.

[8] In this regard it is significant that reimbursement for backpay is not mandatory under the Act. The Act may be effectuated with "reinstatement of employees with or without back pay." Sec. 10(c). Moreover, in view of the fact that Respondent Ravenna was a successor employer who had committed no unfair labor practices, a posted notice would have been of doubtful efficacy.

minatees, as well as those of other alleged wildcat strikers, had already been denied by Respondent Akron on June 25, 1979.

Further procedures under the contract with Respondent Akron allowed "[t]he Union the option of submitting a grievance to an impartial umpire as it has in the past 'or' if the grievance cannot be settled at Step 4 and either party elects to exercise ecomomic power, it must do so within the sixty (60) days or the grievance will be considered settled." Hence, it is clear that, at the time of the settlement of the discharge grievances, the Union was faced with either abandoning the grievances, selecting an umpire,[9] or striking.

Besides being faced with these choices, the Union has pending against it suits in the Federal and state courts which charged misconduct by certain persons, including the alleged discriminatees, and which involved many thousands of dollars. A complaint had been issued against the Union by the General Counsel on July 26, 1979, naming discriminatees Donnal May, Eddie Lee May, Helis Palmer, and others as having engaged in unfair labor practices. The unfair labor practice charges of Palmer and Probst for wrongful discharge had been pending against Respondent Akron since July 16 and August 1, 1979, respectively.[10] Additionally, a successor employer had come into the picture, a circumstance which triggered the renegotiation of Respondent Akron's labor agreement.

Surely expertise in the field of labor relations discloses that even under most favorable circumstances it is difficult to obtain the reinstatement of all wildcat strikers where the wildcat strike had been lost. Such difficulty would seem to be aggravated where, as here, the General Counsel has issued a complaint naming some of the alleged wildcat strikers as culprits. Furthermore, the union negotiators, having been close to the strike, must have had less than a suspicion as to which employees instigated and participated in the wildcat strike. Indeed, it is significant that Probst, who together with the alleged discriminatees comprised the committeemen who represented the Union during the strike, accepted reinstatement. Under these circumstances the Union ought not be faulted for agreeing to reinstatement of the alleged wildcat strikers conditioned upon the withdrawal of the pending unfair labor practice charges of Probst and Palmer which were of speculative merit. (The complaint as to Palmer was not issued until March 26, 1981.) The surrender of 8 weeks' backpay was a reasonable exercise of the Union's statutory authority as the representative of the alleged discriminatees. Indeed, in effecting the settlement agreement the Union could not have avoided reviewing the same facts as did the General Counsel, but from an inside point of advantage.

It is true that the statutory duty of fair representation demands that "the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." It is also true that the the Union commits an unfair labor practice if employees are denied the "right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment." *Vaca v. Sipes*, 386 U.S. 171, 177–178 (1967). As stated in *Electrical Workers IBEW (Union Pacific Railroad Co.) v. Foust*, 442 U.S. 42, 47 (1979), "In particular, a union breaches its duty when its conduct is 'arbitrary, discriminatory, or in bad faith.'"

Here the Union cannot be charged with either arbitrary or discriminatory conduct or with acting in bad faith. Had it neglected its statutory duty to make an honest effort to try to negotiate the alleged wildcat strikers back to work, a question may have arisen as to the Union's good faith. Had it failed to represent all the alleged wildcat strikers on an equal basis, it could have been charged with discrimination. However, the Union clearly sponsored the best interests of all employees. Thus, the individual employee's self-interest must be subordinate to the best interests of the group. To this end a compromise presented a desired means through voluntary resolution of the grievances. "Compromises on a temporary basis, with a view to long-range advantages, are natural incidents of negotiation." *Ford Motor Co. v. Huffman*, supra at 338. Furthermore, the record does not reveal that any alleged wildcat striker, including the alleged discriminatees, objected to the settlement agreement at the time it was negotiated. Probst, who had filed an unfair labor practice charge, withdrew same. Donnal May did not file his charge until many months later. Palmer, who knew his way to the General Counsel, filed no charges that the Union had lacked in good faith or breached its statutory duty in representing him. Indeed, with the facts before him, the General Counsel allowed Probst to withdraw his charge.

Thus, the Union, commanded by the statute to represent all employees in the unit, had fulfilled its responsibility in good faith, with honesty of purpose, and for the ultimate welfare of the group it represented, and the group was bound by its action even though unfair labor practice charges were pending in respect to the same subject matter. The Supreme Court has stated:

> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion. [*Ford Motor Co. v. Huffman*, supra at 338.]

The Supreme Court has further stated:

[9] That is if the parties followed Respondent Akron's contract.

[10] Donnal May did not file his charge until December 12, 1979, and Eddie Lee May had filed no charge. Thus, the return to work by these employees was not conditioned upon the withdrawal of unfair labor practice charges filed by them. The only employees who were subject to this condition were Palmer and Probst.

> The collective bargaining system as encouraged by Congress and *administered by the NLRB* of necessity subordinates the interests of the individual employee to the collective interests of all employees in a bargaining unit.

Hines v. Anchor Motor Freight, 424 U.S. at 564, quoting *Vaca v. Sipes*, 386 U.S. at 182 (emphasis added).

That the Union chose negotiation rather than other techniques for the settlement of the labor dispute, such as arbitration, does not imply that it had not fulfilled its statutory responsibility.

While "the federal policy favoring arbitration of labor disputes is firmly grounded in congressional command" (*Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 377 (1974)), "a union does not breach its duty of fair representation . . . merely because it settled the grievance short of arbitration" (*Hines v. Anchor Motor Freight*, 424 U.S. at 567).

Since 1955 the Board, with court approval and apparent congressional sanction, has deferred to the arbitral process negotiated by the parties to a labor agreement where certain safeguards are satisfied. *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955). The same sound labor policy which has persuaded the Board to defer to the decision of an arbitrator is equally persuasive of a deference to a voluntary settlement composed honestly and in good faith between the union representing a majority of an employer's employees in an appropriate unit and an employer.

"[The] congressional policy [that final adjustment by the method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes] 'can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play.'" *Hines v. Anchor Motor Freight*, supra at 562.

Where there is a conflict of legitimate interests, as here, a balance must be struck by the Board between those interests which will effectuate national labor policy. "It is the Board's function to strike a balance among 'conflicting legitimate interests' which will 'effectuate national labor policy.'" *NLRB v. Magnavox Co.*, 415 U.S. 322, 326 (1974).

In the instant case the balance weighs in favor of deferring to the voluntary agreement negotiated between the Union and Respondent Ravenna.[11] It is recommended that the 8(a)(3) allegations in the second amended consolidated complaint be dismissed. Cf. *North Electric Co.*, 215 NLRB 324 (1974). Accordingly, it is recommended that the Board issue the following[12]

ORDER

It is hereby ordered that the second amended consolidated complaint be dismissed in its entirety.

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[11] "[T]he Board has . . . deferred to a private settlement agreement where the Board was convinced that, given the particular facts of the case, it would effectuate the policies of the Act not to disturb the agreement." *Roadway Express*, 246 NLRB 174 (1979).

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.